Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 86-384

GERALD SVETANOFF,

Petitioner,

vs.

HARRIET L. McMILLIAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Counsel for Respondent

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit appears as, McMillian v. Svetanoff, 793 F. 2d 149 (7th Cir. 1986). This opinion has been reproduced and is included in Appendix 1 of Petition For Certiorari.

JURISDICTION

The Petitioner invoked this Court's jurisdiction under the provisions of 28 U.S.C. §1254(1). The Respondent's Brief in Opposition to the Writ is submitted under the authority of Rule 24(1) of the Rules of the Supreme Court.

STATUTES INVOLVED

The federal statutes and constitutional provisions here involved are 42 U.S.C. §1981, 1983 and the First Amendment to the Constitution of the United States.

42 U.S.C. §1981

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizens of the United States or other persons within the jurisdiction thereof to the deprivations of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit is equity, or other proper proceeding for redress."

FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

QUESTION PRESENTED

Whether a State Court Judge may invoke the protection of the doctrine of absolute judicial immunity, when he terminates the employment of a Court Reporter and in so doing, allegedly violates that employee's Constitutional and statutory rights.

STATEMENT OF THE CASE

Respondent, Harriett McMillian, a black female, was employed as a Court Reporter for Lake County Superior Court from February, 1973 to July 1, 1981. When the Petitioner Svetanoff was elected and took office as judge, he summarily terminated her employment. The Respondent filed suit in Federal District Court under 42 U.S.C. §§1981 and 1983, and the First Amendment to the Constitution of the United States, seeking both monetary and equitable relief. On June 10, 1983, the Petitioner filed his Motion for Partial Summary Judgment as to the damage claims, alleging that his conduct was protected by the doctrine of absolute judicial immunity. The District Court on March 4, 1985 rejected the Petitioner's asserted claim of absolute immunity and denied his Motion for Partial Summary Judgment. Petitioner then appealed to the United States Court of Appeals for the Seventh Circuit which affirmed the District Court's ruling denying Petitioner's Motion for Partial

Summary Judgment. It is the Court of Appeals' order, affirming the judgment of the District Court that forms the basis for the Petitioner's instant Petition For Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The Petitioner's act of terminating the Respondent's employment was administrative in nature, not a judicial function and therefore, the instant Petitioner may not now shield himself against liability behind the doctrine of absolute judicial immunity.

ARGUMENT

The Petitioner's Petition for Writ of Certiorari should be denied because the Petitioner has not presented any real issue to this Court for review. To the contrary, the Petitioner seeks here to have the Court redefine, again, what acts, or conduct constitute a "judicial act" such as to be entitled to the protection against liability offered by the doctrine of judicial immunity. Both the District Court and the Seventh Circuit Court of Appeals in the instant case each considered the proper question or issue as not whether the instant judge acted within his statutory authority when he fired the Respondent, but rather, whether that act or decision was made in the Petitioner's judicial capacity. Both courts below, relying on established and ruling Supreme Court precedent resolved the issue with no difficulty and held that this act of terminating this employee was not a judicial act.

Judges wear at least two hats, i.e., judges have both judicial and executive (or administrative) functions. Hiring and firing subordinates are executive, administrative functions. This basic distinction is a well settled principle of law. Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. (1978), Lopez v. Vander-

water, 620 F. 2d 1229, (7th Cir. 1980), Harris v. Deneaux, 776 F. 2d 942 (11th Cir. 1985), Holloway v. Walker, 765 F. 2d 517 (5th 1985), note, WHAT CONSTITUTES A JUDICIAL ACT FOR PURPOSES OF JUDICIAL IMMUNITY? 53 Fordham L. Rev. 1503.

Carried to its logical extreme, the instant petition would attach absolute immunity to any decision made by a judge within the scope of his lawful authority. Whether an act is "judicial" depends on the character of the act.

This Court in Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099 (1978) provided specific guidelines to be used by the lower courts when confounded with the issue or what conduct constitutes a judicial act for the purposes of judicial immunity.

Specifically:

1. The precise act complained of . . . is it a normal judicial function?

2. The events involved, did they occur in the judge's chambers or in open court?

3. Does the controversy center around a case then pending before the judge?

4. Did the controversy arise directly and immediately out of a visit to the judge in his judicial capacity. Stump, Supra, 98 S.Ct. at 1107.

In the instant case, applying the Stump factors, above, reveal unerringly that the conduct complained of here was administrative and not judicial.

A brief analysis of this Court's opinion in the case of Pierson v. Ray, 386 U.S. 553, 87 S.Ct. 1213, reveals yet another clear reason why the doctrine of absolute judicial immunity could not, and should not have been invoked in the instant case. In Pierson, this Court held that aggrieved parties had an avenue of recourse, i.e., appeal, without suing the judge. This Court held that should a judge err through inadvertence or otherwise, a party's remedy is through the appellate process, Pierson, 386 U.S. at 554, 87 S.Ct. at 1217-18.

The facts of the instant case clearly establish that the Petitioner's conduct complained of was not a "judicial" act subject to review by any appellate tribunal. Query, to what appeals court could the Respondent request and obtain review of the Petitioner's purely administrative act of terminating her employment? The answer, most simply stated, is none.

CONCLUSION

This Court should deny the Petitioner's Writ of Certiorari because:

1. The Petitioner's conduct terminating the employment of the Respondent was not a judicial act entitled to the protection of the doctrine of absolute judicial immunity.

2. This Court, in Stump v. Sparkman, 435 U.S. 349 and its progeny has defined judicial acts and has given the lower courts a workable viable guideline in deciding the issue of what acts constitutes judicial conduct.

3. The Respondent's federal and constitutional rights are at issue and if given immunity the Petitioner will be able to violate the Respondent's rights with impunity and immunity so as to render said federal rights a nullity.

The decision of the Seventh Court of Appeals need not be reviewed as it represents a correct and accurate statement of the law.

Respectfully submitted,

John O. Moss, Attorney for
the Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the Attorney General of Indiana, LINLEY E. PEARSON, State House, Room 219, Indianapolis, IN 46204, by mailing same this 24th day of October, 1986, by U.S. First Class Mail, postage prepaid.

John O. Moss